Tan Sooi Shin v Kow Kek Hing

HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING-UP NO D3-28-493-89
VC GEORGE J
16 MARCH 1990

Companies and Corporations — Winding up — Deadlock between shareholders/directors — Whether court could order sale of shares to opposing shareholder — Companies Act 1965, ss 181, 218 & 221

Civil Procedure — Cross-examination of affidavit evidence — Winding-up petition — Application to cross-examine deponents of affidavits filed in support of the petition and/or adduce oral evidence — Court has discretion whether to allow such application

Tan Sooi Shin, the petitioner, and Kow Kek Hing, the applicant, were the only directors and shareholders (holding equal shares) of Tako Corporation Sdn Bhd. The petitioner invoked s 218(1)(ii) of the Companies Act 1965 ('the Act') and moved to have the company wound up on the grounds that the relationship between him and the applicant had deteriorated to such a state that there was a complete lack of trust and confidence between them which had resulted in a deadlock. The applicant opposed the petition and moved to have it dismissed with costs. In turn, the applicant sought an order for the petitioner to sell all the petitioner's shares in the company to him at a price to be decided by an independent valuer. In addition, the applicant also sought to cross-examine the deponent of the affidavits in support of the petition and adduce oral testimony of himself and his witnesses.

Held, dismissing the preliminary issues as follows:

(1) The relationship between members of a corporation and between the corporation and its members is substantially contractual and governed by the normal laws pertaining to contracts. The terms of the contract are, however, also subject to the Act which provides for interference by the courts with the inherent right of freedom to contract but such interference is minimal.

(2) Where statutory powers are designed to interfere with basic and inherent rights of parties, they must be clearly and expressly stated as has been done in s 181(2) of the Act. The legislation in giving such a power to the court in s 181 had expressly stated the terms of the power but it had not done so in s 221(1) and this leads to the inference that it was not intended that such power be given in relation to s 221(1). Hence, the court had no jurisdiction to order that one shareholder sell his shares in the company or purchase the shares of another pursuant to s 221(1).

(3) As regards the question of cross-examination of witnesses and the adducing of oral evidence, this was not a writ action. It was a petition which was required to be supported by an affidavit or affidavits. Those opposing it may file affidavits in opposition and have them read at the hearing. Applications may be made to have oral testimony adduced and for cross-examination of deponents of affidavits. Whether the court will allow such applications is entirely in the discretion of the court.

(4) Here, as the basis for the petitioner's application was deadlock, who was at fault was not relevant. There was, therefore, no need to use a number of precious days of judicial time for going through what could prove to be something of an academic exercise. If the petitioner could not satisfy the court with affidavits that there was a deadlock situation, the petition would no doubt be dismissed and probably with costs.

[Bahasa Malaysia summary

Tan Sooi Shin, pembuat petisyen, dan Kow Kek Hing, pemohon, adalah pengarah dan pemegang saham (dengan saham yang sama banyak) Tako Corporation Sdn Bhd. Pembuat petisyen menggunakan s 218(1)(ii) Akta Syarikat 1965 ('Akta itu') dan memohon untuk menggulung syarikat itu atas alasan bahawa hubungan antara beliau dan pemohon telah mejadi buruk sehinggakan terdapat kekurangan amanah dan keyakinan sepenuhnya antara mereka yang telah berkesudahan dengan kebuntuan. Pemohon menentang petisyen itu dan memohon supaya ianya ditolak dengan kos. Pemohon pula memohon satu perintah supaya pembuat petisyen menjual kesemua sahamnya di dalam syarikat itu kepadanya pada harga yang ditetapkan oleh seorang penilai bebas. Pemohon juga memohon memeriksa-balas deponen afidavit yang menyokong petisyen itu dan mengemukakan testimoni lisan beliau dan saksi beliau.

Diputuskan, menolak isu-isu permulaan seperti berikut:

(1) Hubungan di antara ahli-ahli satu korporasi dan antara korporasi itu dengan ahli-ahlinya adalah kebanyakannya secara kontrak dan dikawal oleh undang-undang biasa berkenaan dengan kontrak. Syarat-syarat kontrak itu adalah, walau bagaimanapun, juga tertakluk kepada Akta itu yang memperuntukkan bahawa mahkamah boleh bercampur tangan dengan hak sedia ada kebebasan membuat kontrak tetapi percampuran tangan itu adalah minima.

(2) Apabila kuasa statutori digubal untuk bercampur tangan dengan hak asas dan sedia ada yang dipunyai oleh pihak-pihak, ia mesti dinyatakan dengan jelas dan khusus seperti yang telah dibuat dalam s 181(2) Akta itu. Undang-undang itu dalam memberikan kuasa sedemikian kepada mahkamah mengikut s 181 telah menyatakan dengan khusus syarat-syarat kuasa itu tetapi ia telah tidak berbuat demikian dalam s 221(1) dan ini membawa kepada kesimpulan bahawa kuasa sedemikian tidak diberikan berkenaan dengan s 221(1). Jadi, mahkamah tidak ada bidang kuasa untuk memerintah seorang pemegang saham menjual sahamnya di dalam syarikat itu atau membeli saham orang lain mengikut s 221(1).

(3) Berkenaan dengan soal pemeriksaan-balas saksi dan pengemukaan keterangan, ini bukanlah untuk satu tindakan writ. Petisyen itu mesti disokong oleh satu afidavit atau afidavit-afidavit. Orang yang menentang boleh memfail afidavit menentang dan membaca mereka ketika pembicaraan. Permohonan boleh dibuat untuk mengemukakan testimoni lisan dan untuk pemeriksaan-balas deponen afidavit itu. Sama ada mahkamah akan meluluskan permohonan itu adalah mengikut budibicaranya.

(4) Di sini, oleh kerana asas permohonan pembuat petisyen adalah kebuntuan, siapa yang bersalah tidak relevan. Jadi tidak berguna untuk menggunakan beberapa hari masa kehakiman yang bernilai untuk menjalankan apa yang mungkin menjadi satu latihan akademik semata-mata. Jika pembuat petisyen tidak boleh memuaskan mahkamah dengan afidavit bahawa terdapat kebuntuan, petisyen itu tidak syak lagi akan ditolak dan mungkin dengan kos.]

Legislation referred to
Companies Act 1965 ss 181, 218, 221

P Abraham for the petitioner.
Vadiveloo s/o Anumanthan (*Stanley Chang* with him) for the applicant.

Cur Adv Vult

VC George J: Tan Sooi Shin, the petitioner herein, and Kow Kek Hing have been and are the only directors and shareholders of Tako Corporation Sdn Bhd. They hold equal shares. In effect the petitioner says that the relationship between him and Kow Kek Hing deteriorated to such a state that there is a situation of a deadlock and a complete lack of trust and confidence in each other as business partners. He invokes s 218(1)(ii) of the Companies Act 1965 ('the Act') and moves the court to have the company wound up.

Pending disposal of the petition, the petitioner has obtained an order of the court appointing the official receiver as provisional liquidator.

Kow Kek Hing opposes the petition. By his affidavit in opposition (encl 25), he asks for the petition to be dismissed with costs. However, his counsel asks that the court dispose of the petition by ordering the petitioner to sell all of the petitioner's shares in the company to his client at a price to be decided by an independent valuer. Counsel for Mr Kow also says that, in any event, in disposing of the petition the court should allow cross-examination of the deponent of the affidavits in support of the petition and allow Mr Kow to adduce oral testimony of himself and of witnesses he intends to call.

As a preliminary point submissions were made on the following:

(1) Has the court jurisdiction to order a sale of shares in a s 218 petition as can be done in s 181 application?
(2) In any event, should the court allow Kow's application to cross-examine deponents of affidavits in support of the petition and/or adduce oral evidence?

Going through the petition and the affidavits filed by both sides, one cannot avoid noting the tirade of accusations made by each side against the other and cannot but conclude that there is clearly no love lost between the two partners; that there is a total lack of mutual confidence and that there is no way in which they could continue to function as shareholders, equal or otherwise. In other words, there certainly appears to be a deadlock. Deadlock is perhaps the most common ground to seek winding up on just and equitable grounds.

Dato' Vadiveloo leading for Kow Kek Hing contends that the court has the power in a s 218 petition to refuse to order winding up and instead order one or more members of the company to sell his or their shares to other members — in this case the petitioner to sell his shares to Kow — and thereby resolve the deadlock situation and save the company. Winding up, he says, should be a remedy of the last resort.

The relationship between members of a corporation and between the corporation and its members is substantially contractual. The terms of the contract are governed by the normal laws pertaining to contracts but are also subject to the Act which does have provisions for interference by the courts with the inherent right of freedom to contract but such interference is minimal. Such interference by the court with the contractual relationship can only be successfully sought if there are statutory provisions allowing for such interference. One such provision for interference with the terms of the contractual relationship in this context is that provided by s 181(2). Although what is envisaged when a company is incorporated is that members of the company would have the conduct of the company's affairs, the views of the majority to prevail in the event of lack of consensus, where there is oppression the court is specifically and expressly empowered to interfere with majority rule and may, inter alia, regulate the conduct of the affairs of the company and even direct the compulsory purchase of shares of one member by others. It is to be emphasized that the extreme measures in s 181(2) may be resorted to by the courts only on the application of a member, the holder of a debenture or the minister and only where there is oppression as defined in s 181(1)(a) and (b).

The first question posed for resolution here is whether the court has similar powers in a s 218 application. Section 18 and the related section thereto fall within Part X of the Act which deals with the winding up of companies.

Dato' Vadiveloo submits that s 221(1) allows the court, on the hearing of a s 218 winding-up petition, to make any order it thinks fit carte blanche. The relevant portion of s 221(1) is as follows:

> On hearing a winding-up portion the court may dismiss it with or without costs or adjourn the hearing conditionally or unconditionally or make any interim or other order that it thinks fit ...

The said portion of s 221(1) consists of three limbs, viz that on hearing the petition the court may (1) dismiss it with or without costs; or (2) adjourn the hearing conditionally or unconditionally; or (3) make any interim or other order.

It is to be noted that the arrangement of the words used makes it clear that 'with or without costs' has reference to the power to dismiss the petition, 'conditionally or unconditionally' to the power to adjourn the hearing, and it follows that 'or other order' has reference to the power to the court to make any interim order. It is also to be noted that some further support for the view that 'or other order' relates to 'interim' orders has no general application, is obtained from the fact that the phrase used is 'make any interim or other order' and not 'make any interim order' and that there is a fourth limb to the subsection, viz 'or (4) make any other order'.

As I have pointed out earlier herein, where statutory powers are designed to interfere with basic and inherent rights of parties, they must be clearly and expressly stated as has been done in s 181(2). Particularly as the legislation in giving such a power to the court in one section, namely, s 181 had expressly stated the terms of the power but it had not done so in another section of the same statute leads to the inference that it was not intended that such power be given in relation to that latter section.

In my judgment on a true construction of s 221(1), the court has no jurisdiction to order that one member sell his shares in the company or purchase the shares of another.

As to the question of cross-examination of witnesses and the adducing of oral evidence, I have earlier overruled the submissions made on behalf of Mr Kow that the court has no discretion to disallow the application to cross-examine and/or adduce oral evidence. This is not a writ action. It is a petition which is required to be supported by an affidavit or affidavits. Those opposing it may file affidavits in opposition and have then read at the hearing. Applications may be made to have oral testimony adduced and for cross-examination of deponents of affidavits. Whether the court will allow such applications is entirely in the discretion of the court.

Here the basis for the petitioner's application is deadlock. If there is deadlock, who is at fault is not relevant. I saw no call to use a number of precious days of judicial time for going through what could prove to be something of an academic exercise. If the petitioner could not satisfy the court with affidavits that there was a deadlock situation, the petition would no doubt be dismissed and probably with costs.

Accordingly it was my ruling that in a s 218 petition the court has no jurisdiction to order one member to sell his shares in the company or purchase the shares of another. I also refused to allow Mr Kow and/or his witnesses to adduce oral testimony. I also refused the application to cross-examine the deponents of the affidavits in support of the petition. I finally ordered that the costs of and incidental to these preliminary points be paid by Mr Kow. I adjourned the hearing of the petition to 18 April 1990.

Order accordingly.

Solicitors: *Abraham & Partners; Shui Tai & Associates.*

Reported by *Yap Shao Sin*